

MUST WE DISCARD OUR LAW OF NEGLIGENCE IN PERSONAL INJURY CASES?

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The advisability of adopting a new format for the recovery of damages in cases of personal injury caused by accidents seems to hinge mainly on whether or not one advocates the abandonment of the presently governing principles of tort liability in favor of what is known as "absolute" or "strict" liability or "liability without fault." If such a change is made, a corresponding change is also to be expected with regard to the forum before which such recovery would be sought. An administrative board would, in such an event, take over the courts' functions to the same extent as under Workmen's Compensation. This is proposed by the various plans for Automobile Accident Compensation.

This paper is therefore designed to:

1. discuss the fundamental principles and merits of "liability without fault";
2. examine the desirability of its substitution for the principles of tort liability now practised in this country, in the light of this writer's belief in a jurisprudential distinction between the situations to which strict liability now applies and those to which it is proposed to extend it; and
3. refer to some remedial plans which might enable us to improve the present situation, without sacrificing our present system of tort liability for damages caused by injuries resulting from accidents.

DAMAGES AND LIABILITY

A person has suffered an injury to his body. Even though the harm cannot be undone, we shall agree that the victim should be compensated in money as the only available equivalent to his corporal integrity which cannot be restored. But while we agree that he should be compensated, we disagree as to the pocket out of which such compensation is to come. When faced with this problem, the average person will attempt to find the individual whose fault caused the injury and hold him liable for the compensation due the victim. Why will the average person react in this manner? Because he has been brought up in a society in which the conviction that there should be no liability without fault is still deeply ingrained. The history of this development of the fault principle has been traced by many prominent writers¹ and has fairly recently been summarized by Lord Macmillan in the House of Lords in these words:

. . . [T]he process of evolution has been from the principle that every man acts at his peril and is liable for all the consequences of his acts to the principle that a man's freedom of action is subject only to the obligation not to infringe any duty

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of care which he owes to others. The emphasis formerly was on the injury sustained and the question was whether the case fell within one of the accepted classes of common law actions; the emphasis now is on the conduct of the person whose act has occasioned the injury and the question is whether it can be characterized as negligent.²

It has also frequently been pointed out that "fault" in negligence cases "never has become quite synonymous with moral blame"³ and that the "standard applied by the law to determine whether a man has been negligent has always been in large part an external, objective, standard. Where there is a duty to use care, one must act as the reasonably prudent man would under all the circumstances."⁴

However, it must be conceded that an entirely different approach might be taken toward the solution of our problem. It might be said: This injury of a person is damage done not only to the individual as such, but to him as a member of society. Society, particularly in its present complex and mostly mechanized stage, has made this injury possible. If, for example, our victim was injured by an automobile, this is the consequence of society's permission to its members to put automobiles on the roads and fault, if any, "is one chargeable to a society which 'negligently' tolerates dangerous locomotion."⁵ But, regardless of whether or not society "is to blame," since the basic function of tort law is to prevent accidents and to compensate victims of accidents that do happen,⁶ the question as to who is at fault becomes immaterial. It is maintained that, since, "even with successful safety campaigns there will always be a basic residuum of destruction . . . it seems clear that the consequences of this destruction should be borne by society at large, rather than by the individual."⁷ This theory has also been advocated by foreign, particularly French, scholars and has been characterized as a theory of "collective responsibility."⁸ In addition, it is pointed out that society is not interested in a mere shifting of losses from A, the injured, to B, the injurer. "If the only question is whether B shall be made to pay for

¹ See e.g. PROSSER, *TORTS*, 15, 315-49 (2d ed. 1955) (cited PROSSER hereafter); HOLMES: *THE COMMON LAW*, 144-63 (1881); SALMOND, *LAW OF TORTS*, 11-12 (7th ed. 1924); Smith, *Tort and Absolute Liability*, 30 HARV. L. REV. 241, 319, 409 (1917); Harris, *Liability Without Fault*, 6 TUL. L. REV. 337 (1932).

² Read v. J. Lyons & Co., [1947] A.C. 156, 171 (1946).

³ PROSSER, 316. See also 2 HARPER & JAMES, *THE LAW OF TORTS*, §12.1 (1956).

⁴ HARPER & JAMES, *op. cit. supra* note 3.

⁵ EHRENZWEIG, "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM 3 (1954).

⁶ James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 569 (1948).

⁷ James and Thornton, *Impact of Insurance on the Law of Torts*, 15 LAW & CONTEMP. PROB. 431, 443 (1950).

⁸ Takayanagi, *Liability Without Fault in The Modern Civil and Common Law-IV*, 17 ILL. L. REV. 416, 427 (1923), citing writings by Demogue, Tridandil and Duguit as representative of this theory.

this loss, any good that may come to society from having compensation made to *one* of its members is exactly offset by the harm caused by taking that amount away from *another* of its members."⁹ On the other hand, society *is* interested in the widest possible distribution of the losses suffered by it among all of its members, so that each will pay only a bearable portion of the common loss. How should then this loss be distributed? It is submitted that, if this philosophy of loss distribution is accepted, the only logical step toward its implementation is the imposition of taxes¹⁰ or of compulsory contribution by *all* taxable members of society to an insurance fund.¹¹ This writer does not advocate the adoption of such a plan, because he feels that a further increase of the tax burden to cover the costs of all deaths and injuries caused by accidents (regardless of fault), which in 1956 amounted to "at least \$11,200,000,000,"¹² would be unwarranted. Moreover, he believes in the ability of the members of society to weigh the risks to which they are exposing themselves in their everyday lives and prefers to leave it to them to cover those risks by voluntary insurance, which, as Holmes remarked, "if desired, can be better and more cheaply accomplished by private enterprise."¹³ The insurance fund mentioned above would still be a fund designed to cover society's "liability." To such an insurance this writer raises objections similar to those formulated by Professor Ehrenzweig and which he expected might be raised to his own theory: "Why should the airplane passenger be able to recover from the operator of his plane because the latter should have taken out [liability] insurance, although the plaintiff himself, before boarding the plane, could very well have been expected to protect himself by [life and accident] insurance?"¹⁴ Finally, if we cast the principles of tort liability overboard and adopt social insurance in their place, we shall have Great Britain's social insurance which provides "a comprehensive system of minimum grants, insuring everybody, regardless of personal and financial status, against the major vicissitudes of modern life, and providing a bare minimum subsistence, but no more"¹⁵ minus Great Britain's recovery under those same tort principles of negligence law which even she refused to scrap.¹⁶

⁹ James, *supra* note 6, at 549.

¹⁰ See James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L. REV. 537 (1952).

¹¹ Oliver Wendell Holmes indicated this by saying: "The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members." THE COMMON LAW, 96 (1881).

¹² NATIONAL SAFETY COUNCIL, ACCIDENT FACTS, p. 4 (1957).

¹³ HOLMES, THE COMMON LAW, 96 (1881).

¹⁴ Ehrenzweig, *Assurance Oblige, A Comparative Study*, 15 LAW & CONTEMP. PROB. 445, 451 (1950).

¹⁵ Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 HARV. L. REV. 241, 242 (1949).

¹⁶ "This possibility was thoughtfully explored in England, and rejected,

Nevertheless, the theory of distribution of losses among *all* members of society by way of taxation has the merit of consistency. It is the logical and only implementation of the idea of "collective responsibility."¹⁷ On the other hand, any theory which rejects such method of implementation, while advocating the basic concept of distribution, and attempts to accomplish such distribution by establishing "group" or "enterprise" instead of collective responsibility, seems to this writer a half-measure theory, deserving such label certainly no less than the various exceptions tending toward strict liability which have been ingrafted upon the fault principle of tort law.

ENTERPRISE LIABILITY

A number of eminent writers, among them Professor Albert A. Ehrenzweig, Dean Robert A. Leflar, Professors John V. Thornton, Harold F. McNiece and Fleming James, Jr., to name only a few, assert that "The law of negligence as it exists today is obsolete,"¹⁸ that the "negligence rule, though phrased in terms of fault, has, with regard to tort liabilities for dangerous enterprise, come to exercise a function of loss distribution previously developed mainly within the rules of strict liability" and that this "new function of 'fault' liability has transformed its central concepts of reprehensible conduct and 'foreseeability' of harm in a way foreign to its language and original rationale and has thus produced in our present 'negligence' language a series of misleading equivocations."¹⁹ It is pointed out that our concepts of liability for fault have been riddled by exceptions through which strict liability has been imposed and that, even where language of "fault" is used, "Courts and juries have been increasingly willing to find legal fault with less and less moral blameworthiness on the part of the actor."²⁰ It is therefore suggested that we should discard the "horse and buggy rules in an age of machinery"²¹ and adopt the principle that "each enterprise should pay its own way,"²² *i.e.* be liable for the harm it causes regardless of fault. It is reasoned that society allows the "entrepreneur" to pursue his potentially dangerous activity because it is socially desirable, but, in return, the entrepreneur must assume the risk of such an enterprise, especially since he is in a better position to insure himself against such risks, *i.e.* he is the better "risk bearer." Thus, distribution over the widest area, *i.e.* among all members of society, is rejected as contrary to the "social policy" underlying a free enterprise system and, being indirect subsidization of

largely because of unwillingness to deprive injured people of the chance of the much greater recovery at common law." James, *supra* note 10, at 542.

¹⁷ Takayanagi, *supra* note 8.

¹⁸ McNiece and Thornton, *Is The Law of Negligence Obsolete?*, 86 ST. JOHNS L. REV. 255, 276 (1952).

¹⁹ EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT*, 86-87 (1951).

²⁰ James, *supra* note 10, at 546.

²¹ James, *supra* note 6.

²² Leflar, *Negligence in Name Only*, 27 N.Y.U.L. REV. 564, 584 (1952).

an enterprise at the expense of society generally, it is considered "as much a violation of this social policy as is direct subsidization out of the public treasury."²³

However, Professor Ehrenzweig, for example, recognizes, of course, that a rule of "unrestricted liability for all causation . . . would not only be impracticable, but could be rationalized only by the paradoxical argument that the innocent injured is 'still more innocent than the innocent injurer' . . ."²⁴ and he expresses his belief that fear of such a rule may have been the reason why the "struggle between an injurer's and an injured's law of tort has, up to the present time, been fought within a law of fault liability."²⁵ He therefore advocates the adoption of liability for "negligence without fault" for harm "typically caused by lawful conduct."²⁶ This then means that liability regardless of fault should be imposed whenever what Professor Ehrenzweig calls the "typicality test" is met. He explains the application of the test in an example of the keeper of a wild animal whose liability would, under the test, extend to that "'general type of harm' the causation of which was foreseeable and avoidable when he started his hazardous activity."²⁷ Thus, while the activity is lawful, liability for the "typical harm" would be imposed as "one of the necessary burdens and expenses incident to such activities."²⁸

In analyzing this theory the first difficulty encountered is doubt as to what constitutes an "enterprise." Is it any activity which involves the risk of harm to others? If so, then everyone pursuing such activity acts "at his peril." Obviously, Professor Ehrenzweig does not mean that. "Such a proposition is merely ridiculous. Life would not be worth living on such terms. Life never has been lived on such terms in any age or in any country,"²⁹ and Professor Ehrenzweig expressly rejects the rule of "unrestricted liability for all causation."³⁰ Just as Professor Wex Malone,³¹ this writer, too, has been unable to find a definition of "enterprise" in Professor Ehrenzweig's book, except in his explanation of "quasi-negligent" activity as "an activity initially negligent but legalized because of its social value."³² In turn, does "initially negligent" mean "ultrahazardous," as used by the *Restatement of Torts* in section 519? Probably not, since, as the author points out, activities which are a "matter of common usage" are excluded by section 520 of the *Restate-*

²³ *Ibid.*

²⁴ EHRENZWEIG, *op. cit. supra* note 19, at 14.

²⁵ *Id.* at 13.

²⁶ *Id.* at 14.

²⁷ *Id.* at 50.

²⁸ HARPER, A TREATISE ON THE LAW OF TORTS, 351 (1933).

²⁹ Winfield, *The Myth of Absolute Liability*, 42 L.Q. REV. 37, 38 (1926).

³⁰ EHRENZWEIG, *op. cit. supra* note 19, at 14.

³¹ Malone, *This Brave New World—A Review of "Negligence Without Fault"*, 25 SO. CALIF. L. REV. 14 (1951).

³² EHRENZWEIG, *op. cit. supra* note 19, at 66.

ment, whereas the author apparently includes them in his term "enterprise." It seems, therefore, that the word "enterprise," as Professor Ehrenzweig uses it, cannot be explained without combining it with the "typical harm" inherent in it and which, under the theory, is a prerequisite of liability regardless of fault. Thus, an enterprise is, presumably, any lawful activity capable of producing a type of harm to which the "typicality test" applies. Again reference can be made to Professor Wex Malone's lucid criticism³³ revealing the difficulties in using this extremely complicated test. He shows that it is not clear, for example, whether "typicality" should apply to the type of risk or also to the way in which the harm was inflicted, that considerable doubt may arise as to whether a harm is or is not typical, even with respect to examples given by Professor Ehrenzweig himself. If, Professor Malone reasons, a typical risk is one which is frequently connected with the activity in question, then the test can be applied "simply by holding the enterprise liable for the great bulk of the risks to which it exposes the public, for nearly all such risks are in general typical of the operation," in which case we are back to unrestricted liability for all causation.³⁴

Practically speaking, would a traffic policeman be liable (regardless of fault) if his signals are misunderstood and, as a result, somebody is injured in a collision? Is he the entrepreneur or the city which employs him? (We must remember, of course, that the rule of *respondeat superior* would not apply under the theory.) Was the harm typical to the enterprise? It probably belonged to the "general type of harm" the causation of which was foreseeable and avoidable when he started his hazardous activity. Should he have, therefore, insured himself against the risk? Or should the city have done so? If, as a result of the same misunderstanding, an automobile driver injures a pedestrian, which enterprise becomes liable, the driver's or the policeman's or both? Is not the harm "typical" for both? How about the car manufacturer's enterprise? When he embarked upon his enterprise he must have been fully aware of the fact that the car he made, good or bad, might, when driven, cause injury to someone. Isn't, therefore, his activity "quasi-negligent" and the harm resulting "typical" for his enterprise? Or does his liability end when he delivers the car to the dealer, with the dealer's enterprise taking over liability? If so, does this mean we eliminate *MacPherson v. Buick*,³⁵ even if the car was made negligently?

Dean Leflar's illustrations of "enterprise" do not seem to do much more to clarify the above problems. He states: "The enterprise or activity may have been the operation of a factory or a trucking business or a powder magazine, it may have been the driving of two of ten million pleasure automobiles on a Sunday . . . it may have been anything"

³³ Malone, *supra* note 31, at 18, 19.

³⁴ *Ibid.*

³⁵ 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F 696 (1916).

[emphasis added]."³⁶ If "anything" may be an enterprise which is pursued at the entrepreneur's peril, we are again faced with the unacceptable rule of "unrestricted liability for all causation."

However, even if we knew what is meant by "enterprise liability" and by "typicality of harm," other features of this theory of liability would be open to objection. One of the justifications of enterprise liability has been the theory that the entrepreneur derives material or ideal *profit* from the dangerous activity. The financial loss suffered because of his liability is reduced by such profit, but remains smaller than the loss the victim would have to bear in the absence of enterprise liability and in case of his failure to recover from the injurer under tort principles.³⁷ But, we may ask, is the entrepreneur the only one who derives profit from his activity? Supposing goods are transported by the seller's truck from the seller's warehouse to the buyer's establishment and en route a person is injured. "Is it for the benefit of the seller or the buyer that the seller sends his goods to the buyer? Is it for the benefit of an enterpriser or of the public or of both that the railroad is operated?"³⁸ Doubt has been cast by another writer on the theory that "one who has the benefit of the thing, should, in exchange, have the responsibility for the damages that it causes"³⁹ in these words:

But there may be doubts on the value of this justification, when one reflects that in our day everyone derives benefit from the employment of such dangerous things as machines and automobiles, even those who do not possess them. If other persons did not possess them, they would not have available in their homes or near at hand many things which we regard as indispensable.⁴⁰

The same author mentions as one example that everybody in the community has an interest in bus services and derives benefit from these potentially dangerous vehicles. Hence, the conclusion that the entrepreneur should alone be liable under the benefit theory does not seem convincing.

However, it is maintained that the entrepreneur is the "better risk bearer," because he is "probably" in a better position than the victim to insure himself and thus spread the loss among holders of a similar type policy, even though not over society as a whole. Two objections might be raised to this theory. First, it is hard to accept the contention that defendant should pay merely because he is richer than the plaintiff and that a motorist, for example, must be made to pay simply because he "has the deeper purse, or should have if he undertakes the car-owning

³⁶ Leflar, *supra* note 22, at 578.

³⁷ Ehrenzweig, *supra* note 14, at 447.

³⁸ Takayanagi, *supra* note 8, at 430.

³⁹ Esmein, *Liability in French Law for Damages Caused by Motor Vehicle Accidents*, 2 AM. J. COMP. L. 156, 160 (1953).

⁴⁰ *Id.* at 164.

enterprise [emphasis added]."⁴¹ Several writers have rejected this approach. One pointed out that such a rule would penalize the "industrious, courageous and intelligent,"⁴² another stated that "our sense of justice is outraged when claimants are favored merely because they happen to be poor and defendants are disfavored merely because they happen to be rich."⁴³ The other objection is that it is by no means always true that the defendant is the better risk bearer than the plaintiff. This has been clearly demonstrated by Professor Morris who reaches the conclusion that "a general rule of absolute enterprise liability or liability for hazardous undertakings is bound to saddle some kind of defendants with losses they can bear no better than the kinds of plaintiffs compensated."⁴⁴

It is also argued that the entrepreneur is in a better position to bear the risk because he can pass the cost of liability or insurance on to the consumer. On the other hand, it has been shown that the "economics of this argument is . . . built on dubious assumptions and oversimplifications . . ."⁴⁵ and that the theory might apply to monopoly industries, but certainly not to many small manufacturers and enterprises operating on marginal profit, and that a price increase made necessary by the absorption of such cost might, to an individual, mean pricing himself out of the market.⁴⁶ Besides, should we not remember that "the law of torts even today affects large numbers of people who are neither employers nor manufacturers, [and that] for them the difference between strict and non-strict liability is still important,"⁴⁷ in other words that there are people who cannot pass the cost on to anyone?

This brings up the question of insurance premium costs for liability regardless of fault in general. We are reminded that the abolition of the negligence requirement has been advocated "without dealing in any positive fashion with the mounting cost of insurance."⁴⁸ It is quite true, of course, that accurate studies of such costs based on a specific rule of law are very difficult.⁴⁹ However, attempts at estimating costs have been made, at least in the field of automobile accident liability. Thus, Mr. Charles J. Haugh, Actuary for the National Bureau of Casualty and Surety Underwriters, calculated in 1929 that the *minimum* cost of compulsory automobile compensation insurance (based on liability regardless

⁴¹ Leflar, *supra* note 22, at 581.

⁴² Lucey, *Liability Without Fault and The Natural Law*, 24 TENN. L. REV. 952, 955 (1957).

⁴³ Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172, 1177 (1952).

⁴⁴ *Id.* at 1179.

⁴⁵ *Id.* at 1176.

⁴⁶ Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 947 (1957).

⁴⁷ Friedmann, *supra* note 15, at 264.

⁴⁸ Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219, 239 (1953).

⁴⁹ James, *supra* note 6, at 552.

of fault) in New York would be \$80,351,695 a year, *not* considering the effect of increased claim frequency or the cost of accidents occurring outside of New York State. In 1930, Austin J. Lilly, General Counsel of the Maryland Casualty Company, estimated that, taking into account a modest cost of administration of only 20 per cent, medical, hospital and funeral expenses and a few other factors, such as an increase in claims due to an increased "claim-consciousness" which such plans will inevitably evoke, the loss cost to American motorists with their 25 million motor vehicles then registered would come to \$866,160,000 per annum. But today, with 65,500,000 registered automobiles, a higher rate of injuries and deaths than in 1930, with higher standards to be considered, higher costs of administration and an even greater claim-consciousness,⁵⁰ those figures would be immeasurably increased. Professor Glenn A. McCleary's article on the peculiar type of the "last clear chance" doctrine in Missouri⁵¹ includes a chart⁵² which demonstrates that Missouri automobile liability insurance rates are considerably higher than those of other states on a comparable basis. Professor McCleary attributes this to the increased responsibility imposed by Missouri law under its type of humanitarian doctrine. Recently, an insurance expert expressed his view on this point and concluded that, if damages in automobile accidents were to be paid regardless of fault, the cost of such insurance would be "well-nigh prohibitive" and would "sharply limit its sale."⁵³ It can hardly be doubted that, if liability without fault were adopted for all recoveries in personal injury cases caused by accident, the cost would be even more prohibitive.

THE FAULT PRINCIPLE AND ITS EXCEPTIONS

From what has been said above this writer draws the conclusion that enterprise liability does not seem the alternative to be adopted in preference to our present system of fault liability and that it is wiser to maintain the latter as a rule and depart from it in favor of strict liability only in the relatively limited area in which exceptions to it are felt to be in the interest of justice. Perhaps we have fought the "struggle between an injurer's and an injured's law of tort"⁵⁴ within a law of fault liability simply because most of us still feel that, as a rule, a person should not be held liable for something "he did not do." As one writer put it: "The impulse to relieve the innocent is one which we cherish as a part

⁵⁰ LILLY, COMPULSORY AUTOMOBILE INSURANCE, COMPULSORY COMPENSATION FOR MOTOR VEHICLE INJURIES AND MOTOR VEHICLE FINANCIAL RESPONSIBILITY LAWS, ASSOCIATION OF CASUALTY AND SURETY EXECUTIVES, p. 22 (1930, as reprinted 1932).

⁵¹ McCleary, *The Bases of the Humanitarian Doctrine Rerexamined*, 5 Mo. L. REV. 56 (1940).

⁵² *Id.* at 87.

⁵³ DesChamps, *Coverage for Innocent Victim Pays Off*, 1956 INS. L.J. 722-23.

⁵⁴ EHRENZWEIG, *op. cit. supra* note 19, at 13.

of our emotional adulthood, and we are not likely to surrender it easily."⁵⁵

As indicated above,⁵⁶ the concept of "fault" never was synonymous with "moral blame" and whatever moral censure there was has been further diluted in the law of negligence, so that today it has practically nothing to do with morally reprehensible conduct. It means only that we had to establish a line, more or less arbitrary and certainly highly flexible according to existing circumstances, which we called the "conduct of the reasonably prudent man." One who fell below that line became liable, even though we recognized that anyone of us might drop below it at any time, simply because we are human beings and hence fallible. In this fashion "the defendant's fault provides the law with a basis for compensating the plaintiff"⁵⁷ for defendant's harm-causing conduct which, in the court's opinion, could have been avoided if the standard of care of the reasonable man had been observed. On the other hand, if such standard *was* in fact observed, then recovery is, generally speaking, denied.

However, just as many other rules, this rule, too, had to be modified by exceptions as time went on, particularly with the development of our mechanized age. The conduct of human affairs became more and more extensive and less and less personal. There is no denying that ours is a far cry from the "horse and buggy" age. But there are certain immutables which do not, or should not, change along with the change of times. The sense of human justice is one of them. True, with the change of concepts, the law, too, had to be adjusted to the new concepts. However, that cannot mean that we ought to adopt a new system which is entirely foreign to our basic thinking, such as the imposition of liability regardless of fault on one group of society merely because of one type of activity which that particular group pursues, while the rest of society lives under entirely different rules.⁵⁸ The imposition of different rules can be justified only if the manner in which that activity is pursued is different from the manner in which the individual member of society as a whole is expected to conduct his business. That is why section 520 of the *Restatement of Torts* restricts the rule of *Rylands v. Fletcher*⁵⁹ in its original form and excludes "common usage" from the application of its "ultra-hazardous activity" standard, since, if a large segment of society is engaged in such an activity, the hazard involved becomes one of the hazards of daily living common to all, making the imposition of a

⁵⁵ Malone, *supra* note 31, at 16.

⁵⁶ *Supra* note 3.

⁵⁷ Jaffe, *supra* note 48, at 221.

⁵⁸ "It is dubious social policy to single out a particular group in society and make its members or some of its members bear the cost of what may be a very commendable reform, while everyone else in society operates under an entirely different legal doctrine and philosophy." Plant, *supra* note 46, at 948.

⁵⁹ 1368 L.R. 3 H.L. 330.

special type of liability upon a particular actor unnecessary and unjust.⁶⁰

Thus imposition of strict liability appears in various forms as an exception to the fault principle. Among the persons on whom such strict liability has been imposed by statute or by the courts are, for example, the keepers of animals which stray onto the land of others or of wild animals, persons who engage in an activity which is highly dangerous to others and, at the same time, abnormal in the community, such as the storing of explosives in thickly settled communities, blasting and nuisances, such as smoke, dust, bad odors, noxious gases and the like from industrial enterprises, all obviously related to the cases following *Rylands v. Fletcher*⁶¹ and, of course, the employer under Workmen's Compensation.

It would seem that these heterogenous types of strict liability are not based on one comprehensive theory, but are justified by the high degree of harm the activities involved are likely to produce and the generally unusual circumstances under which they take place. However, it is submitted that a common denominator might be found which may explain their rationale. This is not to say that the courts and legislatures have consciously adopted the reasoning discussed below. Yet, such reasoning may have led to the establishment of strict liability in such instances as those used as examples above.

THE ELEMENT OF CONTROL

The influence of the element of control upon strict liability might be explained in the following fashion: Society says to the individual: "You are the master of your activities. You are expected to be in control of those activities. As long as you are 'at the controls' we shall expect you to act with the care of any reasonably prudent man under the circumstances, so as to avoid harm to others. If you exercise such care, you will not be held liable. However, if, for certain reasons, control of the activity which you set in motion is not in your own hands, we shall be unable to apply such a standard of care to you, because there can be no standard of care in the absence of control. Hence, we shall hold you liable regardless of your fault." What are the circumstances under which such control is absent?

1. Where control cannot be exercised

- a) because of the nature of the instrumentality itself (wild

⁶⁰ "The reason would appear to be that if the activity is one carried on by a large proportion of persons in the community, the incidence of harm and the incidence of responsibility are so nearly coextensive that nothing would be gained by imposing strict liability. Unless there is a special danger created by a small segment at the expense of the general public, absolute liability would merely substitute a risk of liability for a risk of loss. This interpretation of the common usage test is borne out by the ordinary refusal to apply absolute liability in cases of accidents involving automobiles or household plumbing." Note, 61 HARV. L. REV. 515, 520 (1948).

⁶¹ PROSSER, 337.

- animal, dynamite, etc.) or
b) because of the complexity of the activity involved which makes internal control of the various stages of which it is made up impossible (industrial enterprises subject to Workmen's Compensation).

2. Where control has been delegated to others.

It should be pointed out that "control" as used in the doctrine of *res ipsa loquitur* has acquired a connotation different from the one used here. The doctrine becomes inoperative when control ends, which means that the inference of defendant's liability disappears. This, in turn, means that, under those circumstances, he is not expected to be "at the controls" any more, since someone else has taken over entirely or partially. On the other hand, the word as used in this discussion implies that the defendant *should be* in control but is not and, as a result, is saddled with liability regardless of fault. Dean Prosser has pointed out the inadequacy of the use of the word "control" in connection with the doctrine of *res ipsa loquitur* and suggests that it should be replaced by saying merely "that the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it."⁶²

It seems that impossibility of control is the real basis of the definition of an ultrahazardous activity used by the *Restatement of Torts*: "An activity may be ultrahazardous because of the instrumentality which is used in carrying it on, the nature of the subject matter with which it deals or the condition which it creates."⁶³ In rejecting the rule of *Rylands v. Fletcher*, Judge Williams said: "Even if the rule stated were a just one . . . it should be applied with careful discrimination to things which, like grass, spread slowly and are subject to more or less control."⁶⁴

It should be kept in mind, of course, that sometimes circumstances will determine whether or not control can be exercised in such manner as to prevent harm. Thus it will become important, for example, in what location blasting operations are conducted, *i.e.*, whether in populated areas or in remote places,⁶⁵ just as the question as to whether control can be exercised over an animal will depend on the locality in which the animal is to be controlled. Thus Prosser reminds us that in Burma an elephant is regarded as a safe, domesticated animal.⁶⁶

Again, in the case of industrial workers protected by Workmen's Compensation, absence of direct control is the striking element. "Prior to 1900 the owner of a plant usually operated it, was regularly in the

⁶² *Id.* at 206.

⁶³ RESTATEMENT, TORTS §520(b), comment b (1938).

⁶⁴ *Gulf, C. & S.F.R. Co. v. Oakes*, 94 Tex. 155, 58 S.W. 999, 52 L.R.A. 293 (1900).

⁶⁵ See PROSSER, 336, n. 74, citing, among others, *Alonso v. Hills*, 95 Cal. App. 2d 778, 214 P.2d 50 (1950).

⁶⁶ PROSSER, 323, n. 87.

plant, and generally felt a sense of responsibility toward his employees. The 'trust' movement introduced the absentee owner, with resulting decline in sense of responsibility. Processes were speeded up, greater energy was used to operate heavier machines, and operations became steadily more dangerous."⁶⁷ We witness a "vast aggregation of machinery which the individual workman can neither comprehend nor *control* [emphasis added]."⁶⁸ Obviously, neither can the employer, absentee or resident.

Finally, we reach strict liability where one person has authorized another to act for him, thus delegating direct control of the activity to the other. Liability then is imposed under the doctrine of *respondeat superior*. While it is quite true that the reason for such liability can be found simply in policy considerations, the justification of such policy seems more convincing when viewed within the frame of the theory here developed. Thus he who should pursue his own activity with the care of a reasonable man has chosen to have someone else do it for him. He is liable for the failure of his delegate to live up to the standard of care, not because he exercises a fictitious control over the delegate (which may be an adequate criterion to qualify the delegate as a "servant"), but because he has made it impossible to apply the standard to himself, although it is his activity which his delegate is pursuing. The widest application of this principle is, of course, found in the master's liability for the torts of his servant committed while acting in the course of his employment⁶⁹ and extended to agents other than servants⁷⁰ and, in some instances, to independent contractors, a development foreseen by Professor Seavey in 1934.⁷¹ Extension of liability for torts of independent contractors is based on various theories, such as negligence in selecting him, or inherently dangerous activities with which the contractor is entrusted, etc. However, the doctrine of non-delegable duty seems the most convincing argument in favor of imposing liability upon the contractee.⁷²

In some other instance, in which vicarious liability is imposed, the

⁶⁷ SOMERS AND SOMERS, *WORKMEN'S COMPENSATION*, 8 (1954).

⁶⁸ DOWNEY, *WORKMEN'S COMPENSATION*, 6-8 (1924).

⁶⁹ RESTATEMENT, AGENCY §219 (1933).

⁷⁰ PROSSER, 356.

⁷¹ Seavey, *Speculations as to "Respondeat Superior"*, HARVARD LEGAL ESSAYS, 433, 456 (1934). Professor Morris advocates liability of the contractee by saying: "... while it is usually desirable that a contractor be ultimately liable for his torts, in general, the contractee should be responsible to third persons," Morris, *The Torts of An Independent Contractor*, 29 ILL. L. REV. 339, 345 (1934).

⁷² The difficulties in establishing when a duty is non-delegable have been pointed out by many writers. For extensive discussions of this and other problems of liability for torts of independent contractors see especially Morris, *supra* note 71, Steffen, *Independent Contractor and the Good Life*, 2 U. CHI. L. REV. 501 (1935) and Jolowicz, *Liability For Independent Contractors in the English Common Law—A Suggestion*, 9 STAN. L. REV. 690 (1957). The last named writer suggests two criteria for finding a duty non-delegable: 1. the value of the plaintiff's interest to which damage has been caused and 2. in some cases, the character of the risk created by the activity.

courts justify their holdings frequently on the ground that liability should exist because the defendant retained control over the delegate and hence the delegate's negligence should be imputed to defendant, particularly in automobile negligence cases, where the owner, by his mere presence in the car, was said to have exercised control.⁷³ This language seems confusing and the device of imputing the driver's negligence to the owner unnecessary. It appears simpler to base the owner's liability on the theory that, by giving up control of his car to the driver, thus entrusting him with an activity which he himself should have been pursuing, he became strictly liable for the driver's negligence, regardless of the fact that he chose to be a guest in his own car. This reasoning also seems to underly provisions like section 59 of the New York Vehicle and Traffic Law which imposes liability on the owner of an automobile, even though not present in the car, for injuries to third persons caused by the negligence of anyone who operates the car on a public highway with the owner's consent. Likewise, the "family purpose doctrine," under which liability is imposed on the owner of an automobile who permits members of his household to drive it for their own convenience, may be explained in the light of the above control theory.

LIABILITY FOR AUTOMOBILE ACCIDENTS

While the adoption of "enterprise liability" has been advocated in all areas of damages for personal injuries resulting from accidents, these efforts have been particularly persistent in the field of automobile accident liability. Various compensation plans have been proposed, the merits of which this writer has discussed elsewhere.⁷⁴ In essence, they are all based on "liability without fault" and patterned after the so-called Columbia Plan,⁷⁵ with the benefits scheduled along the lines of Workmen's Compensation and the administration entrusted to a compensation board, deriving the funds necessary for compensation from insurance premiums paid on a compulsory basis by all motorists. Most of the plans are "exclusive," which means that the injured person loses his right of recovery in tort against the injurer. No compensation is paid for pain and suffering. For business and professional men, profits take the place of wages in the calculation of awards. For certain groups of non-wage earners minimum wages are "assumed." These plans, although frequently proposed, have to date been rejected in all jurisdictions, except in the Canadian province of Saskatchewan, where a somewhat modified version of a compensation plan is in operation.

When we apply the control theory developed above to automobile

⁷³ See e.g. *Gooch v. Wagner*, 257 N.Y. 344, 178 N.E. 553 (1931).

⁷⁴ See Ryan and Greene, *Pedestrianism: A Strange Philosophy*, 42 A.B.A.J. 117, 133 (1956).

⁷⁵ REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES (1932).

cases, it becomes obvious that none of the conditions for strict liability established under it apply to the liability of the operator of a motor vehicle. Control over the ordinary vehicle is by no means impossible, either by the nature of the instrumentality or by the complexity of the activity. As long as the responsible driver is at the controls, we can apply the standard of the reasonable man to him and hold him liable for falling below it. The driving of an automobile is a matter of common usage.

This together with the fact that the risk involved in the careful operation of a carefully maintained automobile is slight, is sufficient to prevent their operation from being an ultrahazardous activity. However, the use of an automotive vehicle of such size and weight as to be *incapable of safe control* and to be likely to crush water and gas mains . . . is not as yet a usual means of transportation and, therefore, the use of such an automobile is ultrahazardous [emphasis added].⁷⁶

Nevertheless, one of the most vigorously asserted arguments for all compensation plans is the similarity of their rationale to the principles of Workmen's Compensation. That the situations are not analogous has been demonstrated previously⁷⁷ on the ground that the accident compensable under Workmen's Compensation arises out of employment, that the insurance cost can be passed on to the consumer, that the loss can be weighed against accident preventing measures and thus induce the introduction of such measures, that there is privity of contract between employer and employee, absent in automobile accident cases, that there is comparative equality of awards under Workmen's Compensation, based on generally similar wage scales, which, of course, does not apply in automobile cases, etc. A recent study prepared by the New York Temporary Commission on the Courts points, moreover, to the difference in the philosophical justification of compensating an employee regardless of anyone's fault as compared to compensating a stranger if injured through his own negligence, to the absence of a real yardstick for measuring compensation of children, housewives and students, and to the willingness of an employer to satisfy his employee by payment of a contestable claim, in order to promote "good will," which would be totally absent in automobile cases.⁷⁸

⁷⁶ Carter, J. in *Luthringer v. Moore*, 31 Cal. 2d 489, 498, 499, 190 P.2d 1, 7 (1948).

⁷⁷ Ryan and Greene, *supra* note 74.

⁷⁸ THE TEMPORARY COMMISSION ON THE COURTS, IN RE A COMPENSATION PLAN FOR AUTOMOBILE NEGLIGENCE CASES, 65, 68 (August 1956). This has also been stressed recently in these words: "Even if the analogy between industrial and vehicular accidents is a true one, certain basic objections to such a plan still remain. In the first place, while a schedule of benefit payments could be satisfactorily worked out for wage-earners, a real problem would exist in creating a suitable schedule for those victims who were self-employed or in the executive

But if we assume that there is sufficient analogy in these two situations, it would seem advisable, before adapting the principles of Workmen's Compensation to a new field of application, to examine whether the system of Workmen's Compensation, as practised at the present time, offers sufficient inducements to such a wholesale adoption. Only a few questions can be raised within the framework of this article to illustrate the difficulties encountered in the present administration of Workmen's Compensation, which would be multiplied if such a plan were extended to automobile accidents.

It has been said that under Workmen's Compensation "the payments for maiming are much, much less than in a negligence action."⁷⁹ In support of this statement the author of the cited article reminds us that in *Affolder v. New York C. & St. L.R.R.*⁸⁰ the plaintiff was awarded \$80,000 in a court action for the loss of one leg, while under the New York compensation statute, which is one of the most liberal ones, he would have received \$17,280, in Indiana, where the injury occurred, \$11,000 and in Vermont \$4,250. A recent study by the Institute of Judicial Administration tells us: "The fundamental concept of Workmen's Compensation is speedy, simple and inexpensive justice. . . . However, complex procedures have developed and over 100,000 litigated cases arise in this field each year."⁸¹ This is also reflected in Justice Murphy's statement that certain Workmen's Compensation terms are "deceptively simple and litigiously prolific."⁸² Thus Workmen's Compensation has come under heavy attack recently, mainly because of the inadequacy of its benefits, the high administrative expense and the excessive litigation of the compensation system.⁸³ As to the last mentioned criticism, it has been said that the amount of litigation in Workmen's Compensation represents "a great great gap between theory and practice."⁸⁴ Is there any reason to assume that these disadvantages will be lessened rather than increased in automobile accident compensation? The above cited study by the Institute of Judicial Administration also reaches the conclusion that "neither Workmen's Compensation, nor a similar agency for automobile tort cases will eliminate the need for

class. Any suggestion that this problem can be remedied by leaving the victim a tort remedy over and above the compensation remedy [Grad, *Recent Developments in Automobile Accident Compensation*, 50 COLUM. L. REV. 300, 329 (1950)] would be no solution at all, for it would only serve to superimpose an administrative process upon an already overly congested court system." Note, 32 N.Y.U.L. REV. 147, 155, n. 44 (1957).

⁷⁹ Jaffe, *supra* note 48, at 236.

⁸⁰ 339 U.S. 96 (1950).

⁸¹ INSTITUTE OF JUDICIAL ADMINISTRATION, ADMINISTRATIVE BOARDS FOR AUTOMOBILE TORT CASES—WORKMEN'S COMPENSATION COMPARED (DELAY AND CONGESTION—SUGGESTED REMEDIES SERIES No. 8) (May 15, 1956) p. 16.

⁸² *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 479 (1947).

⁸³ KULP, CASUALTY INSURANCE 134 (3d ed. 1956).

⁸⁴ J. REID, U.S. BUREAU OF LABOR STANDARDS, Bull. 172, p. 157.

representation by counsel, despite the intentions of the drafters of the statute,"⁸⁵ and that "the expert testimony problems faced by parties in automobile tort litigation have not been solved by the majority of Workmen's Compensation agencies."⁸⁶ How far from offering a whole-sale solution the adoption of compensation schedules is, is illustrated by the statement that, as far as litigation over the degree of disability is concerned, which "the fathers of compensation laws thought they had settled by benefit formulas and schedules," such formulas cannot determine these medico-legal questions.⁸⁷ Not only do the Workmen's Compensation laws fail to avoid litigation, but, under some interpretations of their provisions, the employer becomes liable for amounts beyond the established schedules. Thus, he may be strictly liable for the scheduled benefits in case of direct action by the employee, but remain liable in tort beyond such benefits if the action is brought by a third party, a result contrary to the basic idea of "exclusiveness" of the remedy against him under the Workmen's Compensation laws. This situation was presented in *Westchester Lighting Co. v. Westchester County Small Estates*,⁸⁸ where defendant's employees negligently broke a gas pipe maintained by the plaintiff in a public highway, as the result of which gas escaped and killed one of defendant's employees in the course of his employment. In an action by decedent's administratrix judgment was recovered against the plaintiff who now brought action against defendant for reimbursement of the sums he had to pay in the previous action, including costs. Defendant's contention that he, having taken out insurance under Workmen's Compensation, was liable only for the scheduled benefits, was held not to constitute a good defense. Thus, because the money passed through the hands of a third party, the employer became liable beyond the compensation schedule. This case has been followed consistently by a long line of subsequent cases. Translated into automobile compensation, the following would result: Assume that automobile drivers A and B collide on a grade crossing. A is severely injured and brings an action against the railroad, alleging the latter's negligence in maintaining the crossing. A recovers a substantial sum against the railroad which considerably exceeds what he could have recovered under automobile compensation schedules (regardless of fault). The railroad, having paid A, now brings an action against B, claiming that it was B's negligence which caused the accident and the loss of money to the railroad. Under the *Westchester* case the fact that B was insured under automobile accident compensation, hence only liable under compensation schedules, would be no bar to plaintiff's recovery, since, as in the *Westchester* case, the action is not brought under subrogation, but is based on

⁸⁵ INSTITUTE OF JUDICIAL ADMINISTRATION, *supra* note 81, at 17.

⁸⁶ *Id.* at 19.

⁸⁷ SOMERS AND SOMERS, *supra* note 67, at 183.

⁸⁸ 278 N.Y. 175, 15 N.E.2d 567 (1938).

an independent cause of action. Thus, insurance under the compensation plan would not protect B and he would still be liable under the common law principle of negligence. In a number of cases, then, the victim would still resort to the common law, in order to get a higher award, even though he would have to do it by way of a third party action, and thus obtain indirectly what he could not get directly. The results as to court congestion would be similar as in the case of adoption of "non-exclusive" compensation systems.⁸⁹

This writer pointed out elsewhere⁹⁰ that the adoption of a compensation board for automobile accidents would entail the establishment of a very sizeable apparatus, with a full complement of law-trained personnel, adjusters, etc. to handle the expected large number of claims and determine such issues as causal relationship, character and extent of injuries, etc. It must also be remembered that virtually *every* accident would result in a claim before the compensation board and would have to be processed by it, whereas at the present time a majority of claims is settled before ever reaching the courts. But the most important objection to the determination of these claims by an administrative board lies in the person on whose judgment the award depends. Insistence on judicial review of administrative adjudications in this country is prompted by the greater confidence we place in our judges as compared to administrative functionaries. We have, therefore, contrary to the British system, retained the principle of judicial review in Workmen's Compensation cases. Thus Dean Arthur Larson concluded in a recent article⁹¹ that the British Commissioner of Insurance and his administrators, even though lawyers, are far more inclined to be bound by the letter of the statute or regulation they administer than a judge whose easy familiarity with the law and its administration enables him to cut through its wording and reach its intent and policy. It is to be expected that determination in the usually far more serious automobile accident cases will require an even greater skill and experience from the awarding body which, therefore, should not be left without judicial supervision, even at the initial stage of proceedings. If, then, we are to allow judicial review of decisions made by the administrative board, as we obviously must, and let the plaintiff sue on principles of tort liability in the courts, either whenever he alleges any negligence, as under the Saskatchewan plan, or criminal negligence or willful or wanton acts, as suggested in some plans,

⁸⁹ See Note, *supra* note 78. See also ILLINOIS LEGISLATIVE COUNCIL, MOTOR VEHICLE ACCIDENT COMPENSATION, PUBLICATION 128 at page 33 (Nov. 1956), which concludes: "Moreover, unless adoption of such a plan of compensation were accompanied by substantially complete elimination of rights to sue under traditional negligence concepts, there would still be very substantial burdens on the courts and also a large volume of post-accident investigation and compromise such as now exists."

⁹⁰ Ryan and Greene, *supra* note 74, at 121.

⁹¹ Larson, *The Myth of Administrative Generosity: A Lesson From British Experience*, 40 A.B.A.J. 195, 262 (1954).

we shall only add an overcongested administrative tribunal to overcongested courts.

As pointed out above, it is extremely difficult to estimate the cost of a compensation plan for physical injuries in general and those resulting from automobile accidents in particular. But, in addition to a reference to the estimates noted before,⁹² let us consider merely a few figures from recent sources. In the 1956 study prepared for the New York Temporary Commission on the Courts it was estimated that, not counting expenses connected with the physical apparatus required, such as buildings, personnel, etc., and on the basis of only a 40 per cent cost of administration, Automobile Accident Compensation would, in the State of New York alone, cost \$277,735,900 a year, with benefits computed on the basis of Workmen's Compensation schedules.⁹³ Of this amount approximately \$195,525,640 would be available for actual compensation. However, operating expenses of Workmen's Compensation are much nearer to 48 per cent of all costs and have even been estimated in some states at 56.5 per cent.⁹⁴ The insurer's administrative expenses, measured by Workmen's Compensation experience, would certainly be no lower in an automobile compensation scheme than they are for automobile liability.⁹⁵ "The hopes of compensation supporters of sharp decreases are based principally on expectations of greatly reduced litigation, which in view of the recent attack on workmen's compensation . . . seem unduly optimistic."⁹⁶ But, even if such expense were actually incurred, would this assure an adequate compensation of the victim to which he is entitled under our present system? Doubts in this respect are not allayed when we realize that the estimated cost of wage losses and medical expenses resulting from work injuries amounted in 1955 to \$1,370,000,000, for which compensation paid amounted to only \$920,000,000.⁹⁷ The same costs of automobile accident injuries in the same year were estimated at \$1,470,000,000.⁹⁸ A compensation in the same proportions as indicated above for work accidents would hardly be considered fair and adequate.

The automobile accident compensation system in effect in Saskatchewan, Canada, is the only compensation plan adopted in the Americas.⁹⁹

⁹²LILLY, *op. cit. supra* note 50; McCleary, *supra* note 50; DesChamps, *supra* note 53.

⁹³THE TEMPORARY COMMISSION ON THE COURTS, *supra* note 78 at 122.

⁹⁴SOMERS AND SOMERS, *op. cit. supra* note 67, at 194, 195.

⁹⁵KULP, *op. cit. supra* note 83, at 225.

⁹⁶*Ibid.*

⁹⁷NATIONAL SAFETY COUNCIL, ACCIDENT FACTS (1956) and ACCIDENT FACTS (1957), p. 13, 39.

⁹⁸NATIONAL SAFETY COUNCIL, ACCIDENT FACTS (1956) p. 13.

⁹⁹For details of the plan see especially Marx, *Compensation Insurance for Automobile Accident Victims: The Case for Compulsory Automobile Compensation Insurance*, 15 OHIO ST. L.J. 134, 141 (1954) and Marx, "Motorism", Not "Pedestrianism": *Compensation for the Automobile's Victims*, 42 A.B.A.J. 421, 425 (1956).

The plan is of the "non-exclusive" type, *i.e.*, it reserves to the injured party, in addition to his right to compensation, the right of action in tort, if he alleges negligence on the part of the injurer, but the amount of the compensation award must be credited on the judgment. The plan "is part of a much larger program of nationalization which includes a half dozen basic industries."¹⁰⁰ The same act which created the compensation scheme also established a monopolistic state insurance fund administered by the Saskatchewan Government Insurance Office, to which every driver in the province must contribute. Premiums are extremely low. The main reasons for this fact have been found to be low inherent hazards, low administrative expense and low benefits as well as the circumstance that a compulsory hospitalization insurance system pays all expenses of hospitalization resulting from automobile accidents.¹⁰¹ The province is a thinly settled plain with a population density one twentieth that of Wisconsin. During most of the winter 60 per cent of Saskatchewan cars are totally immobilized because of impassable roads. The extent of the benefits is illustrated by such rates as \$4,000 for the loss of both hands, both feet or both eyes, \$2,700 for the loss of one arm or one leg, \$2,000 for the loss of one hand or one foot or one eye, etc. For medical services "supplemental grants" up to an aggregate of \$600 are given.¹⁰² In 1949 an average payment of \$166 per person is reported.¹⁰³ It seems clear that these conditions and rates are no basis for an analogy to situations existing in the United States.¹⁰⁴ It has justly been said that writers who advocate the adoption of the Saskatchewan plan in the United States overlook the fact that "Americans think in comparatively extravagant terms" and that recoveries in this country are large, because of our greater wealth as compared to other countries.¹⁰⁵ The same writer also reminds us that the "ethical sense—or the sense of caution—becomes somewhat dulled in the presence of an impersonal insurance fund"¹⁰⁶ thus enhancing the claim-consciousness to which our people are prone. One writer reaches the conclusion that "when and if the people of the United States decide for automobile compensation, it will probably be for reasons quite other than those to be drawn from the experience of the Saskatchewan precedent."¹⁰⁷

Reforms of our present system are needed to assure fair, adequate and speedy compensation to all innocent victims of injuries to person and property caused by accidents. As has been pointed out in a previous

¹⁰⁰ KULP, *op. cit. supra* note 83, at 226.

¹⁰¹ *Id.* at 227.

¹⁰² SASKATCHEWAN AUTOMOBILE ACCIDENT INSURANCE ACT 1947, §17, Schedule A.

¹⁰³ THE TEMPORARY COMMISSION ON THE COURTS, *supra* note 78, at 39.

¹⁰⁴ KULP, *op. cit. supra* note 83, at 226.

¹⁰⁵ Jaffe, *supra* note 48, at 238.

¹⁰⁶ *Id.* at 239.

¹⁰⁷ KULP, *op. cit. supra* note 83, at 227.

article,¹⁰⁸ steps toward such improvements have been recommended and have partly been actually taken. One of the measures mentioned was the action by insurance companies in instituting special "endorsements" to the holders of liability insurance policies, extending coverage to bodily injuries to an insured caused by an uninsured motorist in limits of \$10,000 for each person, subject to a maximum of \$20,000 per accident. This coverage extends also to guests of the insured and to the insured and members of his family as pedestrians. Judge Marx quotes one sample of such an endorsement of a mutual insurance company in his recent article¹⁰⁹ which shows that the insurer agreed to pay the compensation *without regard to fault* where the automobile causing the damage was uninsured. Since that article was written, the mutual insurance companies have abandoned this form of endorsement and have, beginning January 30, 1957, reverted to the type of endorsement adopted by the stock companies. The endorsement now contains the clause: ". . . provided, for the purposes of this endorsement, determination as to whether the insured . . . is legally entitled to recover such damages . . . shall be made by agreement between the insured and the company or . . . by arbitration." Thus it seems that their experience with liability regardless of fault of the insured has not commended the continuance of this system to the insurance companies.

In its recommendations dated February 4, 1957, the New York Temporary Commission on the Courts emphatically rejected the adoption of a compensation plan for automobile accident cases. It stated that "automobile cases are, in fact, less than half of total Supreme Court business and in a county like New York County only about 30 p.c. Thus the impact of a compensation plan on the courts would not be as great as frequently claimed. . . ." The Commission bases its rejection of all proposals for such compensation plans on the following reasons: Increased costs to automobile owners and the public, the elimination of fault as a basis of liability, the lack of any legal relationship between the usual parties to accidents (as compared to Workmen's Compensation cases), the probable inadequacy of payments provided if every injury is to be compensated, the substantial increase in number of claims and the likelihood that delay would simply be transferred to the Administrative Agency.¹¹⁰ The Commission also stressed its belief that "all such controversies whether caused by motor vehicles or otherwise should be dealt with in the courts and that the machinery of the administration of justice can be so improved as to deal adequately with all justiciable matters."¹¹¹ Fundamental remedies were suggested regarding Revision

¹⁰⁸ Ryan and Greene, *supra* note 74, at 186-87.

¹⁰⁹ Marx, *supra* note 99 at 424-25.

¹¹⁰ 1957 REPORT OF THE TEMPORARY COMMISSION ON THE COURTS, IV, RECOMMENDATIONS RESPECTING CALENDAR CONGESTION AND DELAY, LEGISLATIVE DOCUMENT (1957) No. 6(c), 45.

¹¹¹ *Id.* at 46.

and Simplification of the Structure of the Courts¹¹² and Revision and Modernization of Practice and Procedure of the Courts.¹¹³ Before those sweeping changes can be adopted, however, calendar congestion is being reduced by devices currently in use, such as intercourt transfer of judges and cases,¹¹⁴ the highly successful pre-trial hearings,¹¹⁵ impartial medical panels¹¹⁶ and special arbitration proceedings worked out by insurance carriers.¹¹⁷ In addition, the Commission has recommended an increase in the number of Supreme Court Justices,¹¹⁸ the appointment of pre-trial masters,¹¹⁹ the adoption of legislation establishing the principle of comparative negligence on an experimental basis,¹²⁰ a greater uniformity in filing fees and cost provisions with the aim of deterring attorneys from bringing actions in a higher court which should have been brought in a lower court¹²¹ and some measures to force expansion of the trial bar by limiting the number of cases any attorney can hold pending while otherwise engaged in trial.¹²²

A few other recent proposals, which suggest remedies while retaining our principle of tort liability, should be mentioned, without discussing their merits within the framework of this article.

Justice Samuel Hofstadter of the New York Supreme Court suggests the assignment of automobile accident cases to a special court, composed of one jurist, one layman and one physician, and the adoption of the principle of comparative negligence. In these cases juries will be dispensed with.¹²³ Mr. Francis H. Patrono, a member of the Pennsylvania Bar, suggests to let juries decide the question of liability in personal injury cases, but, after the jury has rendered a verdict for the plaintiff, to refer the case to a board of specialists in forensic medicine which would hold a hearing, at which both sides would be heard, and whose report would then be the basis of a monetary evaluation by the court, which would be guided by certain standards he suggests.¹²⁴

¹¹² 1957 REPORT OF THE TEMPORARY COMMISSION ON THE COURTS, I, A RECOMMENDATION FOR A SIMPLIFIED STATE-WIDE COURT SYSTEM (1957).

¹¹³ 1957 REPORT OF THE TEMPORARY COMMISSION ON THE COURTS, III FIRST PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE, LEGISLATIVE DOCUMENT (1957) No. 6(b).

¹¹⁴ 1957 REPORT OF THE TEMPORARY COMMISSION ON THE COURTS, IV, *supra* note 110, at 17-18.

¹¹⁵ *Id.* at 18.

¹¹⁶ *Id.* at 19-20.

¹¹⁷ *Id.* at 20.

¹¹⁸ *Id.* at 21-24.

¹¹⁹ *Id.* at 25-38.

¹²⁰ *Id.* at 40-41.

¹²¹ *Id.* at 41.

¹²² *Id.* at 42-43.

¹²³ Hofstadter, *Alternative Proposal to the Compensation Plan*, 135 N.Y.L.J. nos. 49-51 (March 13, 14 and 15, 1956).

¹²⁴ Patrono, *A Proposal for The Reformation of the Trial of Personal Injuries Cases*, 61 DICK. L. REV. 345 (1957).

Professors McNiece and Thornton suggested a few years ago the retention of our "existing legal structure plus compulsory insurance, plus, where necessary, state aid to the needy accident victim (the latter without regard to his personal fault)."¹²⁵ The first part of this suggestion, *i.e.*, compulsory insurance, has recently been adopted in New York State. It should alleviate some of the problems presented by the uninsured motorist, even though some gaps remain to be filled.¹²⁶ It is too soon to tell whether or not the plan will work out satisfactorily.

CONCLUSION

This writer believes that, for the reasons he has tried to develop, it would be inadvisable to discard the tort principles of the American law relating to recovery of damages for personal injuries in favor of compensation plans based on the principle of liability regardless of fault. Everyone agrees that the "first line of defense" against injuries is their prevention. In this respect some excellent suggestions have been made in the direction of proper controls relating to the physical condition of the driver, the increased safety of the vehicle and the stricter enforcement of traffic laws.¹²⁷ On the other hand, this writer feels that our present system, when improved along lines similar to those proposed by the New York Temporary Commission on the Courts, will be perfectly adequate to provide for both fair and speedy compensation of victims of accidents which have not been avoided.

¹²⁵ McNiece and Thornton, *Is the Law of Negligence Obsolete?*, 26 ST. JOHNS L. REV. 255, 273 (1952).

¹²⁶ Note, *supra* note 78, at 162-65.

¹²⁷ McNiece and Thornton, *Automobile Accident Prevention and Compensation*, 27 N.Y.U.L. REV., 585, 591-97.